

1982 S.C. Op. Atty. Gen. 5 (S.C.A.G.), 1982 S.C. Op. Atty. Gen. No. 82-1, 1982 WL 154971

Office of the Attorney General

State of South Carolina

Opinion No. 82-1

January 12, 1982

**\*1 SUBJECT: Motor vehicles-Highways-Municipal Courts**

(1) A driving under the influence charge may be nolle prossed or dismissed by the proper prosecuting officials, as any other criminal case, where the evidence does not justify the prosecution. The defendant may be charged with another offense on a separate warrant or traffic summons if evidence is available to support the charge.

(2) A Judge has no authority to dismiss a criminal prosecution on his own motion prior to trial except at the instance of the prosecuting official, absent an authorizing statute.

(3) Where the Highway Patrol is the charge agency, the State is a necessary party and a city prosecutor may not dispose of such a case without notification to and approval by the proper State authorities

TO: Al Dobbins  
City Prosecutor  
Anderson, South Carolina

**QUESTION:**

You have asked this office about the proper procedure to be followed when a driving under the influence case is brought by the police, and the case is weak factually, but there is ample evidence to support a conviction for reckless driving. May the driving under the influence case be dismissed and the person recharged with reckless driving?

**DISCUSSION:**

I am enclosing for your information copies of two Attorney General's Opinions. They are Attorney General's Opinions, 1967, No. 2327, p. 151; and Attorney General's Opinions, 1965, No. 1852, p. 110. These Opinions state that traffic offenses do not have degrees and, therefore, there can be no reduction to a crime of a lesser degree. However, the Opinions further state that in order to prosecute someone for a different offense than that which he was originally charged, the original offense must be either nolle prossed or dismissed, and the defendant charged anew with the different offense. This may be done either on a warrant or a uniform traffic summons in the case of highway patrolmen, or with a warrant in the case of other police officers. I also direct your attention to the case of [State vs. Fennell, 209 S.E.2d, 433 \(1974\)](#), in which the Supreme Court held that driving under the influence and reckless driving are separate offenses. You have indicated in your letter that you are aware of the fact that reckless driving is not a lesser included offense of driving under the influence. However, the [Fennell](#) case goes on to point out that neither a Magistrate nor a municipal court have jurisdiction to dispose of a case where the defendant has not been formally charged either with a uniform traffic summons or a warrant for that particular offense.

It should also be pointed out that a Judge has no authority to dismiss an indictment or prosecution prior to trial on his own motion except at the instance of the prosecutor. [State vs. Ridge, 236 S.E.2d, 401 \(1977\)](#); [In Re Britton, 263 S.C. 363, 210 S.E.2d 600 \(1974\)](#). Therefore, a Judge has no authority to dismiss a criminal case prior to trial, absent an authorizing statute except at the request of the prosecutor. It might be of help to further point out that in a case where the Highway Patrol is involved, the

State is a necessary party to any disposition of the case, and a city or municipal prosecutor may not act on behalf of the State without the consent of the patrol. [City of Lake City vs. Daniels, 234 S.E.2d 222 \(1977\)](#)

OPINION:

\*2 It is the opinion of this office that a driving under the influence charge may be nolle prossed or dismissed by the prosecuting officials, as any other criminal case, where the evidence does not justify the prosecution. The defendant may be charged with a separate and distinct offense in a separate and distinct warrant or uniform traffic summons if the evidence exists to go forward with that separate charge. These actions must be taken prior to trial or the impaneling of a jury.

A Judge may not dismiss a criminal prosecution on his own motion, except at the instance of the prosecuting official, absent an authorizing statute. Where the Highway Patrol is the charging agency, the State is a necessary party and a city attorney may not dispose of such a case without notification to and approval by the proper State authorities.

Patrick M. Teague  
Assistant Attorney General

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